No. 11285

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPHINE GONZALES,

Appellant.

APPELLANT'S OPENING BRIEF.

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Appellant was convicted on each of two counts of an indictment which charged Violation of Title 21, U. S. C., Section 174 in the first count and Violation of Section 2553(a) of Title 26 U. S. C. in the second count.

One ground will be relied upon for reversal of the judgment below, namely:

It is appellant's contention that in authorizing the jury to reject any explanation which the accused may offer for the sole reason that "such explanation is not to the satisfaction of the jury", Congress has delegated its legislative function and has provided no guide or standard for its exercise by the jury. Also, this language, "to the satisfaction of the jury", is so vague and indefinite, that it permits juries to exercise unlimited discretion and to create their own standards and to base their verdict on prejudice, animus and whimsy, alone, and permits them to arbi-

trarily refuse to give consideration to the most logically convincing explanation which the realities of life in our complex social relationships and conditions are capable of bringing about.

For both of these reasons appellant insists that the acts involved are violative of the due process clause of the 14th Amendment to the Constitution of the United States, and that as construed and applied in the instant trial said laws are null and void for the same reasons.

The pertinent language of Title 21, Section 174 reads:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000 and imprisoned for not more than ten years, whenever on a trial for violation of this section the defendant if shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The presumptions created by the acts herein involved are reasonable and valid. (*Yee Hem v. United States, supra; Boyd v. United States,* 30 F. (2d) 900; *Morlen v. United States,* 13 F. (2d) 625; *Rosenburg v. United States,* 13 F. (2d) 369.) But Section 174 of Title 21, does not stop with the creation of presumptions. It declares

that proof of possession of such drug shall be deemed sufficient evidence to authorize convictions unless the defendant shall explain the possession to the satisfaction of the jury. (Emphasis added.)

Clearly, we have in this language a delegation of power, and unquestionably this delegation of power permits the exercise of an arbitrary discretion. The zeal of the Congress to stamp out a serious vice is commendable but no law which violates constitutional guarantees is commendable nor will it be sustained regardless of good legislative intentions or the nature of the evil attempted to be cured. The decisions construing this act have recognized that they require that the explanation to be given in rebuttal of the presumptions created must be "to the satisfaction of the jury."

In *No Choy Fong v. United States,* 245 Fed. 301, reference being to what is now Title 21, Section 174, it is said,

> "That if, upon trial, a person is shown to have had opium illegally imported in his possession, such possession shall be deemed enough evidence to authorize conviction unless such possession shall explain the possession to the satisfaction of the jury."

In *Yee Hem v. United States,* 69 L. Ed. 904, 268 U. S. 177, where the offense charged was that inhibited by a somewhat similar law, the court approved an instruction which after stating the presumptions, reads in part as follows:

> "The lower court * * * charged the jury in substance that the burden of proof was on the accused to rebut such presumptions; and that it devolved upon him to explain that he was rightfully in

possession of the smoking opium,—at least to explain it to the satisfaction of the jury."

The only question presented, it is said, "is whether Congress has power to enact the provisions arising from the unexplained possession of such opium." Thus the question herein presented was not considered.

Appellant contends that Section 174 exceeds the widest limit allowed to legislative power in requiring that to overcome the presumption of guilt arising from mere possession of opium the defendant's explanation must be "to the satisfaction of the jury."

Every word of the quoted language which ends the provision is plain, unambiguous English. There is no room for statutory construction. Whatever satisfies the jury suffices and no explanation, no matter how conclusive or demonstrative which does not satisfy the jury, will suffice to overcome the presumptions.

Surely no court of justice will say that Congress meant by these plain words that the explanation required is a mere *preponderance of the evidence* or that it is *proof beyond a reasonable doubt.*

It could be held with equal logic that the words in question mean that the jury are to be satisfied if, from the evidence they suspect that the defendant is innocent. It is within the province of the Legislative Department of Government to enact laws by which presumptions are created, and legislative presumptions which assign to proof of a designated fact the force and effect of proof, *prima facie,* or of greater strength, of another fact, are mere rules of evidence, and are valid. (In *Yee Hem v. U. S., supra.*) This power of legislation is qualified by the due process

clause of the Federal Constitution, by virtue of which a law which essays to require the finding of an ultimate fact upon proof being made of a basic where no logical connection exists between the two is arbitrary, capricious and void. (*Yee Hem v. United States,* 268 U. S. 178, 69 L. Ed. 904.)

Thus although it is established that the subject matter of the acts in question are within the province of legislative function of Congress, such a law may be declared null and void as an infringement of rights guaranteed by the due process clause of the 14th Amendment for other reasons than the one passed upon in the *Yee Hem* case. Congress may not delegate its legislative functions, unless it shall "lay down an intelligible principle" or shall "fix standards" to which the officer or body to which such delegation is made "is directed to conform." The law is so declared in *Schecter v. United States,* 295 U. S. 94, 79 L. Ed. 1570 and *Panama Refining Company v. Ryan,* 293 U. S. 388, 79 L. Ed. 449, and decisions quoted or cited therein; *Marshall Field & Company v. Clark,* 143 U. S. 649, 36 L. Ed. 294; *Butterfield v. Stranahan,* 192 U. S. 470, 48 L. Ed. 525; *Wayman v. Southard,* 10 Wheat. 1, 43, 6 L. Ed. 253, 262. A law which is unconstitutional is null and void. It confers no rights and imposes no duties. *City of Tulsa v. W. Bell Tel. Co.,* 5 Fed. Supp. Confirmed 75 F. (2d) 343. Cert. denied, 295 U. S. 744, 79 L. Ed. 1690; *Hackensack Tr. Co. v. Voight,* 75 F. (2d) 270.

It is elementary that laws must be clear and certain in defining offenses. That a law imposing penal punishment which law is vague, uncertain and indefinite as to any material element within its purview, is void is a general

and fundamental rule which has been frequently upheld and given effect. *Schecter v. United States; Panama Refining Co. v. United States,* both, *supra; Hewitt v. Board of Med. Examiners,* 183 Cal. 636, 192 Pac. 442; *Ex. parte McNulty.*

In *Boyd v. United States,* 30 F. (2d) 900, this court, after stating that possession of the narcotic was admitted, said:

> "It is therefore a question for the jury whether his explanation of such possession was satisfactory."

This is undoubtedly plain meaning of the law, but the acts add, "to the jury," and fail to provide any rule by which the jury may not or must be satisfied. In the absence of any such rule it is obvious that the matter is left at large. A jury may, as far as these acts are concerned, refuse to be satisfied by demonstrative proof which is uncontradicted or it might acquit on the most fanciful suspicion based on an accomplice's conjecture. The jury may even consciously act on prejudice against anyone who would associate with the person whom the evidence has shown actually had exclusive possession of the drug, and juries have been known to act on that type of prejudice even when the law did not authorize them to do so.

The *Boyd* case involved Title 21, U. S. C. Section 174, but the question herein presented was not raised in that case, and was not decided.

The opinion in the case of *In re Peppers,* 189 Cal. 682, elucidates appellants Thesis in respect to the inconstitutionality of the instant act by holding: 1. that the language of The California Fruit and Vegetable Standardization Act is so vague and indefinite in its provisions

that it is void, and: 2. That, since, by reason of its vague and uncertain terms, "no standard whatever" is "fixed by the statute", it cannot be the basis of a delegation of power *to a jury to erect for itself a standard.* The language and reasoning of the opinion appears to be unanswerable and it seems appropriate to quote it at length, as follows:

> "The particular portion of the foregoing provisions of said act brought in question by the applicant's attack upon the two remaining counts in said complaint is the provision therein that 'oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped.' It is the applicant's contention that the above-quoted clause in said act is too vague, indefinite and uncertain, standing alone, to furnish the basis of a criminal prosecution such as is sought by the third count of said complaint; and that it is also too vague, indefinite and uncertain to furnish the basis for such a definition thereof by the department of agriculture as is alleged in, and attempted to be enforced by, the second count of said complaint. We are of the opinion that both of these contentions must be sustained. Considering the said clause in said act by itself and unaided by the attempted definition of the department of agriculture, it will be seen that it does not purport to forbid the shipment of all frosted oranges. It thus concedes that oranges may be frosted and may still be the proper subject of shipment and consumption without in any way 'endangering the reputation of the citrus industry.' What defect then shall render certain of such oranges unfit for shipment as 'endangering the reputation of the citrus industry?' What is the reputation of the citrus industry? Is it for the production and shipment of oranges of a

certain standard of color, or of sweetness, or of juiciness, or of palatability? How is the producer whose oranges have been touched with frost to know, from the terms of this act, whether or when he will be violating it in offering his fruit for shipment? By what standard is the complainant to reach the conclusion that the provisions of this clause of the act are being violated by one shipper and not by another? What limitation is therein placed upon the power of the magistrate or of the jury to arbitrarily determine that one shipper of frosted oranges has violated the statute, and that another, shipping precisely the same quality of oranges, has not? The vice of this sort of legislation is quite aptly pointed out in the case of *United States v. Reeve,* 92 U. S. 215 (23 L. Ed. 563, see, also, *Rose's U. S. Notes*), in which the court says: 'If the legislature undertakes to define a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind; every man should be able to know with certainty when he is committing a crime. . . . It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and see who could be rightfully detained and who should be set at large.' In the case of *Louisville etc. Railroad Co. v. Commonwealth,* 99 Ky. 132 (59 Am. St. Rep. 457, 33 L. R. A. 209, 35 S. W. 129), wherein the court was considering the validity of an act providing that a railroad company should not charge more than a reasonable or just rate of fare for the transportation of passengers, the court, in holding the act void for uncertainty, said: 'There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate his conduct; and it seems clear to us to be entirely repugnant

to our system of laws to punish a person for an act the criminality of which depends not upon any standard erected by the law which may be known in advance but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of different juries may suggest and as to which nothing can be known until after the commission of the crime.' "

II.

The Conviction and Judgment Under Count II of the Indictment Is Void.

Section 2553 of Title 26, U. S. C. is the basis of the charge contained in Count II.

Evidence was produced tending to establish such possession of the inhibited drug as is penalized by the act.

Appellant contends that as said act has been construed and applied in this case and others it is fatally vague and indefinite in respect to the force and effect of the presumption which the law creates as the result of proof of possession.

The section reads:

"2553. Packages

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the afore-

said drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax.

(b) Exceptions in case of registered practitioners. The provisions of subsection (a) shall not apply—

(1) Prescriptions. To any person having in his or her possession any of the drugs mentioned in section 2550(a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

(2) Dispensations direct to patients. To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dipensed, administered, distributed, or given away. 53 Stat. 271."

In *Wong Lung Sing v. United States,* 3 Fed. 780, the charge was laid under Count II of the indictment as a violation of Section 1, of the act of December 17, 1914, as amended February 24, 1919 (40 Stat. 1131), called

"The Harrison Narcotic Act", which is apparently not distinguishable from the instant act of December 14, 1914. In passing upon appellant's contention that the evidence was insufficient to sustain the verdict of guilty, the court asseverated:

> "From the evidence of the possession of the suitcase with the contraband drugs, it was permissible to infer guilt, unless the possession was explained to the satisfaction of the jury. * * * Defendant, having failed to make such satisfactory explanation, must abide by the verdict."

In the instant case the Court instructed the jury:

> "And I further wish to call your attention that the section which I have read declares * * * that the absence of stamps is *prima facie* evidence of the unlawful purchase of narcotics."

Again the Court declared:

> "But the section further provides that if anyone possesses narcotics and claims that he comes within the exceptions provided for by the statutes, the duty is upon the defendant to explain and justify his possession."

It is noteworthy that no express provision to this effect is contained in the section proper, or the exceptions which are set forth. [Rep. Tr. of Proc. p. 323.] Later on, the Court told the jurors that if they believed the defendants had in their possession unstamped smoking opium or other narcotics "and cannot satisfactorily explain the same, that is sufficient from which to find them

guilty as to Count II", and finally the Court left the jury no option but directed the jury's decision as follows:

> "If you find beyond a reasonable doubt and to a moral certainty that the defendant Josephine Gonzalez did have such possession, you will find her guilty as charged."

While the Court gave the usual formal instructions as to reasonable doubt as construed with the instructions quoted above such reasonable doubt could only apply to the determination of whether the defendants had possession of the contraband drugs. However, if doubt could exist as to this matter it is removed by an instruction which the Court gave upon the occasion of the jury returning to the jury room to ask certain questions, in answer to one of which the Court announced its interpretation of the law to be as follows:

> "As I stated to you before, you have the undisputed evidence here in this case that narcotics were found and whoever had possession of those narcotics are guilty under this Act, under the instructions that I have given to you. Nobody has disputed the fact that they are narcotics; nobody disputed the fact that they were found where the testimony indicated they were found. Your problem is to determine whether either of the defendants or both of them or neither of them actually had possession at any time of these narcotics. In other words, if there should be a reasonable doubt in your mind that these defendants or either one of them ever had possession of the narcotics it is your duty to acquit them. On the other hand, if you are satisfied that both of them or one of them had possession and you are satisfied beyond a reasonable doubt, then it is your duty to convict."

Therefore appellant contends that said Section 2553 is so vague and indefinite in its provision concerning the effect of the terms "*prima facie* evidence of a violation of this subsection" and "*prima facie* evidence of liability to such special tax" that no intelligible standard or measure of the burden intended to rest upon the defendant as a result of said quoted terms can be found in the act and the jury to which the section has been read have no legal guide to follow.

It seems clear that the trial judge interpreted the language of that section, probably in the light of such other acts in *juri materia* therewith as Section 174 of Title 26, as so definite and certain that the jury are left little or no discretion when and if the element of possession is established beyond a reasonable doubt.

A similar construction was given said language by the trial judge in *De Salvo v. United States,* 2 F. (2d) 222. However the Circuit Court of Appeals (8th Cir.) said that an instruction was erroneous which read: "If you find that he was in possession of these narcotics on that day, then it is your duty to return a verdict of guilty as having made an unlawful purchase of narcotics at that time." In reversing the decision the opinion states that the presumption is not one of law but a presumption of fact.

The vice of the vagueness and uncertainty in said Section 2553 is especially confusing and prejudicial to the rights of defendants, where, as in the instant case, the charge of its violation is associated in the indictment, trial and instructions with a violation of Section 174 of Title 21, which in plain terms requires that the defendant's explanation must be "to the satisfaction of the jury."

A statute, valid on its face, may be unconstitutionally applied, and when this is done, one injured may enjoin its enforcement or have other appropriate remedy. *Weaver v. Palmer Bros. Co.,* 270 U. S. 402, 70 L. Ed. 655; *Yick Wo v. Hopkins,* 115 U. S. 356, 373; *Brock v. Superior Court,* 12 Cal. (2d) 605; *Bueneman v. Santa Barbara,* 8 Cal. (2d) 405.

The legal effect of a trial under this act, especially where, as herein, the accused produced an explanation of her possession of the inhibited drug, is a denial of any trial by jury.

It is submitted that whether or not it be held that his act is fatally vague and indefinite as appellant contends, it cannot be doubted that as construed and applied herein it must be so regarded, otherwise the able trial judges in this case and in the *De Salvo* case would not have been confused and misled, and appellant's counsel is convinced that in the interest of justice the judgments on both counts should be reversed.

Respectfully submitted,

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